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In the Supreme Court of the United States

OCTOBER TERM, 1993

PAUL G. KEOUGH, ACTING REGIONAL ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, REGION I, PETITIONER

v.

AMERICAN POLICYHOLDERS INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Section 1442(a)(1) of Title 28, which is known as the "federal officer removal statute," *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1969), authorizes the removal from state court to federal court of a civil action against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." The question presented is: May an officer of the United States remove a civil action under Section 1442(a)(1) when he or she is sued exclusively in his or her *official* capacity, or does Section 1442(a)(1) apply only when an officer is sued in his or her *individual* capacity?

PARTIES TO THE PROCEEDING

Petitioner is Paul G. Keough, Acting Regional Administrator of the United States Environmental Protection Agency (EPA), Region I. He has been substituted for the defendant below, Julie Belaga, who was named in her official capacity as Regional Administrator of EPA, Region I. Respondent, the plaintiff below, is American Policyholders Insurance Company. The other defendants below were: Nyacol Products, Inc., Robert Lurie, Thomas L. O'Connor, and Daniel S. Greenbaum, in his official capacity as Commissioner of the Commonwealth of Massachusetts Department of Environmental Protection. Nyacol Products, Inc. was also a third-party plaintiff below. The third-party defendants below were: Commercial Union Insurance Company, National Union Fire Insurance Company, and Utica Mutual Insurance Company.

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v.

AMERICAN POLICYHOLDERS INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Acting Regional Administrator of the United States Environmental Protection Agency, Region I, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra,* 1a-17a) is reported at 989 F.2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1993. A petition for rehearing was denied on April 28, 1993. App., *infra,* 29a. On July 19, 1993, Justice Souter extended the time for filing a petition for a writ of

certiorari to and including August 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * *

STATEMENT

This case concerns the proper interpretation of the federal officer removal statute, 28 U.S.C. 1442(a)(1), in light of this Court's recent decision in *International Primate Protection League* v. *Administrators of Tulane Educational Fund,* 111 S. Ct. 1700 (1991). Pursuant to that statute, the Regional Administrator of EPA, Region I (Regional Administrator), removed to federal district court an action brought against her in state court by the respondent, American Policyholders Insurance Company (API). The district court dismissed the Regional Administrator from the action and remanded the case to the state court. The First Circuit vacated the order dismissing the Regional Administrator. Relying principally upon *Primate Protection League,* the First Circuit held that the Regional

Administrator lacked authority to remove the action pursuant to the federal officer removal statute, because she had been sued exclusively in her official capacity, rather than in her individual capacity.

1. API filed its complaint in this case in the Superior Court for Middlesex County, Massachusetts, on December 20, 1991. The complaint named three of API's policyholders—*i.e.*, Nyacol Products, Inc. (Nyacol) and two former officers of Nyacol (collectively, the insureds)—as well as Daniel S. Greenbaum, in his capacity as the Commissioner of the Massachusetts Department of Environmental Protection (DEP), and Julie Belaga, in her capacity as the Regional Administrator of EPA Region I. C.A. App. 9-86 (Complaint); see also *id.* at 13 (¶¶ 21 and 22), 87 (notice of removal ¶ 1), and 95 (Answer of Nyacol Products, Inc. ¶¶ 21 and 22). The complaint alleged that DEP and EPA had notified the insureds that they were potentially responsible under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, and state law for hazardous waste contamination at a site in Ashland, Massachusetts, where textile dyes had been manufactured. C.A. App. 13-17. The complaint sought a declaratory judgment relieving API from defending or indemnifying the insureds for any claims that EPA or DEP might make against them in connection with the contamination at the site. *Id.* at 21-27; see also Mass. Gen. L. ch. 231A (1986) (declaratory judgment statute). The complaint stated that the Regional Administrator and the Commissioner of DEP were "named as parties solely to fulfill the requirements of Massachusetts common law that the underlying claimants be bound by any declaration entered between an insurer and its insured." C.A. App. 10.

2. In January 1992, the Regional Administrator removed the action to the United States District Court for

the District of Massachusetts pursuant to 28 U.S.C. 1441 and 1442.[1] The removal petition stated that the Regional Administrator was "an officer of the United States or any agency thereof within the meaning of [28] U.S.C. 1442(a)." C.A. App. 88. After the case was removed, the Regional Administrator moved to dismiss on the grounds that API's claim against her was barred by sovereign immunity and failed to state a claim for which relief could be granted. *Id.* at 180-185.

In May 1992, the district court granted the motion to dismiss, holding that the complaint failed to state a claim for relief against the Regional Administrator. C.A. App. 437-452 (transcript of hearing on motion to dismiss). At the hearing on the motion, the court observed that no enforcement action in connection with the Ashland site had been brought against either API or its insureds. *Id.* at 442, 445-446. The court determined that it "would be completely contrary to the approach of CERCLA" to force EPA to litigate issues concerning the site prior to the commencement of enforcement proceedings. *Id.* at 445-446. The court concluded, moreover, that in the absence of enforcement proceedings, there was no ripe controversy between API and EPA to support jurisdiction over API's claim against the Regional Administrator. *Id.* at 447. The court accordingly dismissed the Regional Administrator from the case pursuant to Fed. R. Civ. P. 12(b)(6). C.A. App.

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[1] The relevant portion of 28 U.S.C. 1442 is quoted at page 2, *supra*. The other statute upon which removal was premised, 28 U.S.C. 1441(a), provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

449-450. The court found it unnecessary to decide whether dismissal was also required on grounds of sovereign immunity. *Id.* at 450.

Subsequently, the district court entered a final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing API's claim against the Regional Administrator. C.A. App. 467-469. API appealed from that judgment to the United States Court of Appeals for the First Circuit under 28 U.S.C. 1291. C.A. App. 470-471. In the meantime, the district court remanded the remaining claims to the state court. *Id.* at 464; see also 28 U.S.C. 1447(c).

3. After an initial round of briefing, the First Circuit requested supplemental briefing on the question whether, in light of this Court's decision in *International Primate Protection League* v. *Administrators of Tulane Educational Fund,* 111 S. Ct. 1700 (1991), the action was properly removed. In their supplemental briefs, both API and the Regional Administrator stated that removal was proper under 28 U.S.C. 1442(a)(1) because the Regional Administrator was a federal officer, not a federal agency. Gov't Supp. C.A. Br. 2-4; API Supp. C.A. Br. 2; see also App., *infra*, 4a.

The First Circuit nonetheless held that the Regional Administrator could not remove the action under Section 1442(a)(1), because she was sued exclusively in her official capacity. In the court's view, Section 1442(a)(1), as interpreted in *Primate Protection League,* allows removal only by federal officers sued in their individual capacity. The court reasoned that official-capacity suits against federal officers are equivalent to suits against agencies, which *Primate Protection League* held cannot be removed under the federal officer removal statute:

> [API's] suit, brought against Belaga in her official capacity and seeking no relief against her personally, is in reality a suit against the agency. It necessarily

> follows that, because EPA itself could not have removed this action under section 1442, *see Primate Protection League,* 111 S. Ct. at 1708, Belaga's attempt to remove under the same statutory provision must fail.

App., *infra,* 10a. The court observed that its holding was consistent with the Seventh Circuit's decision in *Western Securities Co.* v. *Derwinski,* 937 F.2d 1276 (1991). *Western Securities* held that the Administrator of the Department of Veterans Affairs could not remove a state court action against him to federal court pursuant to the federal officer removal statute, because the action was "against him in his official capacity and such suits are considered to be against the government itself." *Id.* at 1279.

The First Circuit further held that removal was not proper under the general removal statute, 28 U.S.C. 1441, because API's action could not have been brought originally in federal court. App., *infra,* 10a-11a.[2] The court vacated the district court's order of dismissal and directed the district court on remand to reinstate the Regional Administrator as a defendant and to remand API's claim against her to the state court. App., *infra,* 17a.

4. The Regional Administrator's petition for rehearing and suggestion of rehearing en banc were denied. App., *infra,* 25a-28a. In the order denying rehearing, the panel criticized the government's supplemental brief on the removal issue as "perfunctory," apparently because of the government's failure to anticipate and discuss the panel's "official capacity" restriction on the federal officer removal statute. App., *infra,* 26a. The panel also rejected the government's argument that it was not consistent with this Court's reasoning in *Primate Protection League* to

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[2] We do not seek review of that holding in this Court.

treat suits against federal officers the same as suits against federal agencies for purposes of the federal officer removal statute. *Ibid.*

REASONS FOR GRANTING THE PETITION

The First Circuit plainly erred in its reading of both the federal officer removal statute and this Court's analysis of that statute in *Primate Protection League.* In *Primate Protection League,* this Court enforced the officer removal statute *as written,* by holding that the statute authorizes removal by federal officers, and not by federal agencies. In so holding, the Court reasoned that Congress could rationally have concluded that suits against federal officers often raise difficult issues of immunity that should be resolved in federal court, whereas the immunity of federal agencies is sufficiently straightforward that suits against them can be disposed of in the state courts. In this case, the First Circuit purported to rely on *Primate Protection League* to draw a different distinction—*i.e.,* between "official capacity" suits against federal officers and "individual capacity" suits against them. That distinction, however, is nowhere to be found in the text of the statute, and *Primate Protection League* does not support departing from the statutory text to create such a distinction by implication.

The court of appeals' error is significant. The federal officer removal statute permits removal of many actions that should be litigated in a federal forum but are not removable under the general removal statute, 28 U.S.C. 1441. Removal of those actions is barred under the First Circuit's decision. The Seventh Circuit has interpreted the officer removal statute in the same way as did the First Circuit in this case, erroneously relying, as did the First Circuit, on *Primate Protection League.* See *Western*

Securities Co. v. *Derwinski*, 937 F.2d 1276 (1991). In those two and in other circuits, district courts that are guided by those two decisions will issue orders remanding the cases to state courts, and such orders are generally not appealable. Under these circumstances, this Court should grant certiorari to clarify the effect of its decision in *Primate Protection League* and thereby resolve the important question of statutory interpretation presented here.

1. The First Circuit held that a federal officer may not remove an action under Section 1442(a)(1) if the officer is sued exclusively in his or her official capacity. That holding conflicts with the text of Section 1442(a)(1) and with the Court's analysis of that provision in *Primate Protection League*.

a. Section 1442(a)(1) does not distinguish between official-capacity and individual-capacity suits against federal officers. Section 1442(a)(1) imposes only two requirements for removal: The action must be brought (1) "against * * * a[n] officer of the United States or any agency thereof," or the officer's subordinate (2) "for a[n] act under color of such office." The statute does not, on its face, require that the suit be brought against the officer in his or her individual capacity in order for the action to be removable.

Nor can such a requirement be inferred from the language of the statute. With respect to the first requirement prescribed in the statute, an action is "against" a federal officer if it names the officer as a defendant. See, *e.g.*, *Willingham* v. *Morgan*, 395 U.S. 402, 403-404 (1969) (civil action against warden and chief medical officer of federal prison); *Gay* v. *Ruff*, 292 U.S. 25 (1934) (civil action against receiver of railroad appointed by federal district court); *Cleveland, Columbus R.R.* v. *McClung*, 119 U.S. 454 (1886) (civil action against federal customs collector); see also *Mesa* v. *California*, 489 U.S. 121, 125

(1989) (criminal prosecutions against two employees of U.S. Postal Service). As for the second requirement, a suit is for an act "under color of * * * office" if the defendant alleges a colorable federal defense. See *Mesa,* 489 U.S. at 139. Neither requirement can be construed to limit the scope of Section 1442(a)(1) to personal-capacity suits against federal officers. On the contrary, the statute "[a]t the very least * * * is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham* v. *Morgan,* 395 U.S. 402, 406-407 (1969).

Moreover, the "under color of office" requirement of the statute strongly suggests that it permits removal of official-capacity suits. Many, if not most, suits against federal officers for acts under color of their office will be official-capacity suits. Indeed, a primary purpose of the removal statute was to allow such suits to be litigated in a federal forum. As the Court explained in *Tennessee* v. *Davis,* 100 U.S. 257, 263 (1880), the federal government

> can act only through its officers and agents, and they must act within the State. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members.

Quoted in *Mesa,* 489 U.S. at 126. In short, the officer removal statute protects the authority of the federal government by protecting federal officers sued for actions

taken within the scope of their authority, *i.e.*, in their official capacity. See *Willingham,* 395 U.S. at 407.

The First Circuit's decision thwarts Congress's intent to provide the protection of a federal forum for officers sued in state court for official conduct. By holding that official-capacity suits cannot be removed under the officer removal statute, the First Circuit has limited removal under that statute to cases in which it is alleged that an officer has acted *ultra vires* or pursuant to an unconstitutional statute. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-702 (1949) ("the action of an officer of the sovereign * * * can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void"). The First Circuit's interpretation thus withholds the "protection of a federal forum" (*Willingham,* 395 U.S. at 407) from officers who are acting pursuant to valid federal authority. That is precisely one of the situations, however, in which Congress intended the removal statute to apply. *Tennessee* v. *Davis, supra.*

b. The First Circuit relied primarily on this Court's decision in *Primate Protection League.* The court of appeals' reasoning, however, runs directly counter to that of *Primate Protection League.*

In *Primate Protection League,* the Court rejected the government's argument that it would produce "absurd results" to interpret the officer removal statute, in accordance with its plain terms, to permit removal by federal officers, but not by federal agencies. The Court determined that "Congress could rationally have made * * * a distinction" between suits against agencies and suits against officers. 111 S. Ct. at 1708. The Court explained that, when

Congress enacted the statute, it was so well settled that agencies had sovereign immunity that

> state courts could be trusted to dismiss the agency as defendant. The determination of an agency's immunity, in other words, was sufficiently straightforward that a state court, even if hostile to the federal interest, would be unlikely to disregard the law. Thus, agencies would not need the protection of federal removal.

Ibid. In contrast, the Court stated, "the question of the immunity of federal officers who were named as defendants was much more complicated." *Ibid.* That question, the Court explained, often hinged on examining whether the officer was acting outside his or her delegated authority, an inquiry that "was fraught with difficulty and subject to considerable manipulation." *Id.* at 1709. The Court concluded that "[g]iven these complexities, we think Congress could rationally decide that individual officers, but not agencies, needed the protection of a federal forum in which to raise their federal defenses." *Ibid.*

Although *Primate Protection League* distinguished suits against federal officers from suits against federal agencies, the First Circuit read *Primate Protection League* to justify drawing a different distinction—*i.e.*, between official-capacity suits against federal officers, which the court of appeals held are not removable, and individual-capacity suits against them, which the court of appeals held are removable:

> In [*Primate Protection League*], the Supreme Court explained that when a suit for monetary damages is brought against an officer in his or her individual capacity, the complicated questions that arise as to that officer's immunity support a protective grant of removal jurisdiction. See *Primate Protection League,*

> 111 S. Ct. at 1708. By contrast, agencies do not need the prophylaxis of federal removal because determining an agency's immunity, unlike determining an individual's immunity, is a "sufficiently straightforward" proposition. [*Ibid.*] That rationale strongly favors treatment of official-capacity suits for purposes of removal in the same manner as suits against the agency. After all, because a suit against an officer in her official capacity cannot bind the officer personally, * * *, no issues of immunity can possibly arise that differ from those arising in a suit directly against the agency.

App., *infra,* 8a. This reasoning turns *Primate Protection League* on its head.

First, *Primate Protection League* stands primarily for the proposition that Section 1442(a)(1) must be applied as written. As explained above, the Court in *Primate Protection League* posited a distinction between suits against officers and suits against agencies in order to show why it is not absurd to enforce the statute as written. Here, in contrast, the First Circuit posited a rationale for a different distinction—between official-capacity and individual-capacity suits—that the language of the statute does not contain. *Primate Protection League* condemns such an approach. See also *Owen* v. *Owen,* 111 S. Ct. 1833, 1838 (1991) (rejecting interpretation of a statute that "create[s] a distinction that the words of the statute do not contain").

Second, *Primate Protection League* makes clear that, in accordance with the plain language of Section 1442(a)(1), suits against federal officers cannot be treated as equivalent to suits against federal agencies. Yet the court of appeals based its holding on the proposition that certain suits against federal officers—*i.e.,* official-capacity suits—should be treated the same as suits against federal agen-

cies. Even if, as the court of appeals asserted, there is a "general rule * * * that a suit against a government officer in his or her official capacity is a suit against the agency," App., *infra,* 7a, *Primate Protection League* establishes that such a rule does not justify ignoring the text of the federal officer removal statute.

Third, the Court in *Primate Protection League* did not distinguish between individual-capacity and official-capacity suits, as the First Circuit believed. On the contrary, the Court indicated that the entire category of suits against federal officers raised complicated issues of immunity. Indeed, one of the complicated issues to which the Court in *Primate Protection League* referred was the question whether an officer was being sued for individual acts or for acts of the sovereign. 111 S. Ct. at 1708 (an officer's immunity "hinged on 'the crucial question . . . whether the relief sought in a suit nominally addressed to the officer [was] relief against the sovereign' "), quoting *Larson,* 337 U.S. at 687; see also *Kozera* v. *Spirito,* 723 F.2d 1003, 1007 n.3 (1st Cir. 1983).[3] Thus, *Primate Protection League* strongly suggests that the immunity of a federal officer sued in his or her official capacity is not so "sufficiently straightforward" that Congress could rationally have left official-capacity suits for the state courts to resolve, while

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[3] The court of appeals stated that the question whether a federal officer is being sued in his or her official capacity or individual capacity "requires little more than a glance at the pleadings." App., *infra,* 8a n.5. As this Court recognized in *Primate Protection League,* however, the question can often be much more difficult than the court of appeals suggested. See 111 S. Ct. at 1708; see also Davis, *Suing the Government by Falsely Pretending to Sue an Officer,* 29 U. Chi. L. Rev. 435, 453 (1962) ("In some cases that are against the Government in reality the suits are called suits against officers in their official capacity, and in some they are called suits against officers as individuals or in their personal capacity.").

permitting individual-capacity suits to be removed to federal courts.

c. As noted above, the court of appeals purported to discern a "general rule * * * that a suit against a government officer in his or her official capacity is a suit against the agency." App., *infra*, 7a. The decisions of this Court cited by the First Circuit as enunciating such a rule are inapposite.

Three of the decisions discussed the distinction between official-capacity and personal-capacity suits for purposes of 42 U.S.C. 1983. App., *infra*, 6a (citing *Kentucky* v. *Graham*, 473 U.S. 159 (1985); *Brandon* v. *Holt*, 469 U.S. 464 (1985); and *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978)). Those decisions, however, have little bearing in the present context. As the decisions themselves indicate, they are based on Eleventh Amendment principles, which do not apply to suits against federal entities. For example, in *Kentucky* v. *Graham*, the Court held that Kentucky's Police Commissioner was being sued exclusively in his individual capacity, even though the complaint named him in both his individual and official capacities, because "*given Eleventh Amendment doctrine*, there can be no doubt that this damages action did not seek to impose monetary liability on the Commonwealth." 473 U.S. at 169 (emphasis added).[4]

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[4] See also *Brandon* v. *Holt*, 469 U.S. at 472 (emphasis added):

> In *Monell*, the City of New York was not itself expressly named as a defendant. The suit was nominally against the city's Department of Social Services, but that Department had no greater separate identity from the city than did the Director of the Department when he was acting in his official capacity. *For the purpose of evaluating the city's potential liability under § 1983*, our opinion clearly equated the actions of the Director of the Department in his official capacity with the actions of the city itself.

The other two decisions of this Court cited by the First Circuit likewise do not support equating a suit against a federal officer to a suit against a federal agency for purposes of the officer removal statute. The First Circuit cited *Loeffler* v. *Frank*, 486 U.S. 549 (1988), and *FHA* v. *Burr*, 309 U.S. 242 (1940). App., *infra*, 7a. To be sure, *Loeffler* and *Burr* do indicate that the head of a federal agency may be treated the same as the agency itself for certain purposes.[5] For that reason, the United States argued in its brief to this Court in *Primate Protection League* that *Loeffler* and *Burr* supported treating suits against federal agencies the same as suits against federal officers for purposes of the officer removal statute. U.S. Br. in *Primate Protection League*, O.T. 1990, No. 90-89, at 32-34. The Court in *Primate Protection League* implicitly rejected the government's argument when it hewed closely to the language of the statute, which it read to refer only to federal

[5] In *Loeffler*, the Court held that "prejudgment interest may be awarded in a suit against the United States Postal Service brought under Title VII." 486 U.S. at 551. The Court based that holding on the provision that permits the Postal Service to sue and be sued "in its official name," 39 U.S.C. 401(1). *Loeffler*, 486 U.S. at 554-558. The Court rejected the argument that this sue-and-be-sued clause did not apply in Title VII suits, in which Congress required "the *head* of the department, agency, or unit * * * [to] be the defendant," 42 U.S.C. 2000e-16(c) (emphasis added). 486 U.S. at 562 n.8. The Court refused to draw a distinction between the head of the Postal Service (named in Title VII) and the Postal Service itself (named in the sue-and-be-sued clause). *Loeffler* relied on *FHA* v. *Burr*, in which the Court interpreted the sue-and-be-sued clause applicable to the *Administrator* of the FHA to authorize garnishment of the assets of the *agency*. Although *FHA* v. *Burr* presented the "inverse situation" of that presented in *Loeffler*—*i.e.*, in *Burr*, the agency was the named defendant, and the statute at issue referred to the agency head—the Court in *Loeffler* concluded "the same logic applies. * * * [T]he acts of the named defendant are always chargeable as acts of the person or entity" subject to the statute. *Loeffler*, 486 U.S. at 563 n.8.

officers, and not to federal agencies. The First Circuit's similar reliance on *Loeffler* and *Burr* is therefore likewise unpersuasive.

2. This Court should correct the First Circuit's error. The First Circuit's decision precludes removal of state court actions that Congress intended to be litigated in a federal forum but that often will not be removable under the general removal statute, 28 U.S.C. 1441. Two categories of cases are of particular importance.

a. The present case exemplifies one significant category of cases in which removal would be barred by the court of appeals' decision: pre-enforcement actions against federal officials. As discussed above, this is an insurance-coverage case in which API seeks to avoid defending or indemnifying three insureds that EPA has identified as potentially responsible under CERCLA for a contaminated site but has not yet proceeded against in an enforcement action. API named the EPA Regional Administrator in the suit so that the state court proceeding would bind EPA. C.A. App. 10.

API presumably believed that state-court litigation of API's obligations to its insureds could yield findings and legal rulings that would bind EPA to its detriment in future enforcement proceedings against API or the insureds. For example, in its complaint API alleged that it had no duty to defend or indemnify the insureds because the releases of hazardous waste at the Ashland site occurred outside the policy periods. C.A. App. 22-26. The timing of the releases could also be relevant to the insureds' liability under CERCLA. See 42 U.S.C. 9607(a). In sum, as the district court observed, "the very fact of the [hazardous waste] spills may be litigated" in this coverage dispute. C.A. App. 448.

Section 113(h) of CERCLA, 42 U.S.C. 9613(h), however, generally bars pre-enforcement actions in federal

court. In particular, Section 113(h) has been interpreted to bar potentially responsible parties under CERCLA from obtaining federal-court adjudications of their liability before EPA has brought an enforcement action. See *Voluntary Purchasing Groups, Inc.* v. *Reilly,* 889 F.2d 1380, 1386-1390 (5th Cir. 1989). The purpose of Section 113(h) is to spare EPA from having to (1) expend its resources on litigating issues of liability instead of responding to hazardous waste problems; and (2) litigate issues of liability piecemeal. See *Voluntary Purchasing Groups,* 889 F.2d at 1387-1390.

The same considerations apply to state-court actions. As the district court correctly recognized, "it turns the whole scheme of CERCLA on its head" to force EPA in this case "first to litigate rather than do [its] enforcement business." C.A. App. 446, 448. Nonetheless, state-court declaratory judgment actions by insurance companies could become commonplace if the insurance companies and their insureds perceive the court of appeals' decision as creating a way to avoid the bar on pre-enforcement actions in Section 113(h) of CERCLA.[6]

b. A second category of cases affected by the court of appeals' decision comprises state-court actions against the federal government based on state environmental laws. Those actions are made possible by "federal facility" provisions in the major federal environmental statutes that waive the federal government's sovereign immunity from state law. See Clean Water Act (CWA), 33 U.S.C. 1323(a); Safe Drinking Water Act, 42 U.S.C. 300j-6; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6961 (solid and hazardous wastes), 6991f (under-

[6] Although the bar of Section 113(h) of CERCLA in terms applies to federal-court actions, it arguably – but less clearly – bars analogous state-court actions as well.

ground storage tanks) and 6992e (medical wastes); Clean Air Act, 42 U.S.C. 7418(a); and CERCLA, 42 U.S.C. 9620(a)(4).

The operation of the federal-facility provisions is illustrated by this Court's recent decision in *United States Dep't of Energy* v. *Ohio,* 112 S. Ct. 1627 (1992). In that case, the State of Ohio sued the Department of Energy (DOE) for asserted violations of state and federal law at a DOE uranium-processing plant. *Id.* at 1631-1632. The relevant provisions of the CWA and RCRA subjected the United States to "all Federal, State, interstate, and local requirements, both substantive and procedural" concerned with the "control and abatement" of, respectively, "water pollution" and "solid waste or hazardous waste disposal." 33 U.S.C. 1323(a); 42 U.S.C. 6961. The CWA provides that it applies "notwithstanding any immunity of [government] agencies, officers, agents, or employees." 33 U.S.C. 1323(a). RCRA similarly provides that "[n]either the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any * * * injunctive relief [under the provision]." 42 U.S.C. 6961. The Court in *DOE* v. *Ohio* held that these provisions did not waive the federal government's sovereign immunity from civil penalties based on past violations. 112 S. Ct. at 1633-1640. The United States conceded, however, and the Court confirmed, that the provisions did waive sovereign immunity from injunctions and contempt sanctions entered under state law. *Id.* at 1635 & n.15.

Generally, the federal environmental statutes do not contain provisions authorizing removal of actions brought in state courts. A sole exception can be found in the CWA, which plainly contemplates removal in the limited circumstances of federal-facility actions under the CWA. See

United States v. *Commonwealth of Puerto Rico,* 721 F.2d 832, 838 (1st Cir. 1983).[7] However, actions under the other federal-facility provisions will be removable, if at all, only under the general removal statute, 28 U.S.C. 1441, or the federal officer removal statute, 28 U.S.C. 1442.

Moreover, the general removal statute will often be unavailing in suits against federal facilities based solely on state law. In *DOE* v. *Ohio,* the Court held that penalties authorized by state water-pollution laws do not "arise under Federal law" as that phrase is used in the federal-facility provision of the CWA—which makes the United States liable for "civil penalties arising under Federal law," 33 U.S.C. 1323(a)—even though the state penalty provisions must comply with federal guidelines and receive EPA approval before taking effect. 112 S. Ct. at 1637-1639; see also *id.* at 1631. In so holding, the Court determined that the "arising under" phrase in the federal-facility provision of the CWA should be interpreted in the same way as the "arising under" phrase in 28 U.S.C. 1331. Accordingly, the Court in *DOE* v. *Ohio* relied, *inter alia,* on *Gully* v. *First National Bank,* 299 U.S. 109, 114-118 (1936), which held that the well-pleaded complaint rule barred removal of an action based on state law against a national bank under the general removal statute, even though the bank raised a federal defense. The Court's

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[7] 33 U.S.C. 1323(a) provides:

> Nothing in this section [33 U.S.C. 1323] shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 *et seq.* of title 28. * * *

reasoning in *DOE* v. *Ohio* strongly suggests that suits based solely on the state laws to which the federal government is subject under federal-facility provisions do not "arise under federal law" within the meaning of 28 U.S.C. 1331. Such suits therefore would not be within the federal-question jurisdiction of the federal district courts, and could not be removed under the general removal statute.

Federal-facility suits often raise complicated and sensitive questions that should be litigated in federal, rather than state, court. For example, because such suits are often brought by state entities, they often raise important issues of federalism with which federal courts are more familiar. Moreover, federal-facility suits often raise difficult questions of the extent of the waiver of sovereign immunity, as *DOE* v. *Ohio* shows. See also, *e.g.*, *Maine* v. *Department of the Navy*, 973 F.2d 1007, 1010 (1st Cir. 1992); *Redland Soccer Club, Inc.* v. *Department of the Army*, 801 F. Supp. 1432, 1436 (M.D. Pa. 1992). The federal officer removal statute demonstrates Congress's intent that, when such suits are brought against federal officers, the suits should be litigated in a federal forum.[8]

3. We recognize that this Court normally does not grant certiorari to review a question of federal statutory interpretation in the absence of a conflict among the circuits. Nonetheless, we believe that further review is warranted in this case. Unless corrected, the First Circuit's

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[8] It is true that a federal-facility action in state court is not removable under 28 U.S.C. 1442(a) unless a federal officer is named as a defendant. That does not mean, however, that plaintiffs in those actions will invariably avoid naming a federal officer as a defendant in order to prevent removal. Plaintiffs may have good reasons to name a federal officer as a defendant – for example, to ensure that all necessary parties are named in the suit or to be able to pursue contempt sanctions against the responsible individual federal officials for any violations of an injunction.

erroneous interpretation of the federal officer removal statute is likely to take root among the district courts. If that happens, the question presented here, though important, will tend to evade review by this Court.

The only other court of appeals that has addressed the question presented here is the Seventh Circuit. As discussed earlier, at pages 6-8, *supra,* the Seventh Circuit stated in *Western Securities Co.* v. *Derwinski,* 937 F.2d 1276, 1278-1279 (1991), that the Administrator of the Department of Veterans Affairs could not remove a state court action against him to federal court pursuant to the federal officer removal statute, because the action was "against him in his official capacity and such suits are considered to be against the government itself." *Id.* at 1279. That statement was followed by the First Circuit in this case. App., *infra,* 9a.

The Department of Justice did not seek further review in *Western Securities* by the full Seventh Circuit or this Court. In our view, further review would not have been warranted at that point. For one thing, the Seventh Circuit in *Western Securities* sustained federal court jurisdiction on alternative (federal question) grounds. 937 F.2d at 1279-1280. Its discussion of the officer removal statute was therefore arguably dictum. Moreover, it was not clear that other courts of appeals would follow the Seventh Circuit's interpretation.

Now that the First Circuit has joined the Seventh Circuit, however, the likelihood that a circuit conflict will develop has greatly diminished. District courts, even in other circuits, may well be reluctant to part company with the unanimous panel decisions of the First and Seventh Circuits. Those courts may consequently remand "official capacity" suits against federal officers that have been removed under the officer removal statute (in the absence of an alternative basis for jurisdiction). In that situation, the

government will not be able to obtain review by the courts of appeals. That is because, with the exception of certain civil rights cases, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d). Thus, the question of statutory interpretation presented here, despite its continuing importance, is much less likely than other such questions to be further litigated in the courts of appeals.[9]

The tendency of the question to evade appellate review, however, does not diminish its significance. To the contrary, the "long history" of the federal officer removal statute, the development of which has corresponded to "periods of national stress," attests to the importance of "the power of federal officials to have actions brought against them removed to the federal courts." *Willingham,* 395 U.S. at 403, 405; see also P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1057-1059 (3d ed. 1988).

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[9] As we have noted, page 5, *supra,* the question arose in this case only because it was raised sua sponte by the court of appeals and resolved against removal despite the parties' agreement that removal was proper. As also noted earlier, in its order denying rehearing, the panel criticized the government for a supposedly "perfunctory" treatment of the removal issue in its supplemental brief. App., *infra,* 26a. That criticism is not well founded. The government's supplemental brief fully explained the relevance of this Court's decision in *Primate Protection League* to the removal issue in this case. Gov't Supp. C.A. Br. 1-4. Although the panel chided the government for raising "new and additional matters" in its petition for rehearing, App., *infra,* 25a, the only new material in the petition responded to points that arose for the first time in the panel's opinion (since the government had not theretofore had an opposing argument to which to respond). See Gov't Petition for Rehearing with Suggestion for Rehearing En Banc 6-14.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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AUGUST 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1949

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
PLAINTIFF, APPELLANT,

v.

NYACOL PRODUCTS, INC., ET AL., DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. WILLIAM G. YOUNG, *U.S. District Judge*]

Before
SELYA, *Circuit Judge,* COFFIN, *Senior Circuit Judge,*
and STAHL, *Circuit Judge.*

February 24, 1993

Jennifer S.D. Roberts, with whom *Rackemann, Sawyer & Brewster, P.C.* was on brief, for appellant.

Catherine M. Flanagan, Attorney, Department of Justice, Environment & Natural Resources Division, with whom *Vicki A. O'Meara,* Acting Assistant Attorney General, and *David C. Shilton,* Attorney, Environment & Natural Resources Division, were on brief, for Julie Belaga, Regional Administrator, U.S. Environmental Protection Agency, appellee.

SELYA, *Circuit Judge.* This appeal, which arises out of an insurance company's efforts to secure a binding declaration of its rights and responsibilities under an insurance contract, poses an intriguing question: does the "officer removal" statute, 28 U.S.C. § 1442(a)(1), permit a federal official, sued only in her representative capacity, to remove an action to federal district court? Because we think that the statute does not confer such a right, and because there is no other cognizable basis for federal jurisdiction, we return the case to the district court with instructions that it be remitted to a state forum.

I

From 1917 until 1977, a succession of dye-houses occupied a thirty-five acre plot in Ashland, Massachusetts. During these six decades, toxic wastes impregnated the site. Eventually, the United States Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection (DEP) discovered the pollution and documented its source in the dye manufacturing processes. In early 1982, EPA notified Nyacol Products, Inc. (Nyacol), a producer of colloidal silicas at a portion of the site, that it considered Nyacol a potentially responsible party (PRP) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9626, 9651-9662, 9671-9675.[1] Pursuant

[1] EPA also branded two of Nyacol's officers, Robert Lurie and Thomas L. O'Connor, as PRPs. Lurie and O'Connor are named as defendants in the instant suit. For ease in reference, we refer to the company and the individual defendants, collectively, as "Nyacol" or "the insureds." We note, moreover, that although EPA, invoking a theory of successor liability, notified these three defendants that they might be liable for EPA's response costs (past and future), as well as for cleanup costs, EPA has not yet sued to compel payment of these expenses or otherwise to enforce its claimed rights.

to Massachusetts law, which deems PRP notices equivalent to law suits for the purpose of triggering an insurer's duty to defend, *see Hazen Paper Co.* v. *United States Fid. & Guar. Co.*, 555 N.E.2d 576, 581 (Mass. 1990), Nyacol called upon its insurance carrier, plaintiff-appellant American Policyholders Insurance Company (American), to defend it against EPA's claims and to indemnify it for loss, costs, damages, or other expense related thereto. American provisionally undertook the company's defense under its general liability policy. In December of 1991, American brought suit in a Massachusetts state court seeking a declaration that it had no obligation to defend or recompense its insureds. In addition to naming the insureds as parties defendant, American joined two other defendants: Julie Belaga, in her capacity as EPA's Regional Administrator, and Daniel S. Greenbaum, in his capacity as Commissioner of the DEP. Invoking the officer removal statute, 28 U.S.C. § 1442(a)(1), Belaga transferred the action to federal district court.[2]

On February 20, 1992, DEP agreed to be bound by a declaration of rights in American's lawsuit insofar as the judgment resolves insurance coverage issues. The case proceeded against Belaga and the insureds. On May 12, 1992, the district court granted Belaga's motion to dismiss, reasoning that a suit against her, in her official capacity, was really a suit against EPA and that, since EPA had never

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[2] The officer removal statute provides in pertinent part:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office.
>
> . . .

28 U.S.C. § 1442(a)(1) (1988).

sued Nyacol or brought an enforcement proceeding against it, American could articulate no justiciable controversy with EPA. The court entered final judgment for Belaga, *see* Fed. R. Civ. P. 54(b), and remanded all other parties and claims to the state court. American appeals from the dismissal order.

II

While the parties vigorously debate an insurance company's ability, consistent with Article III's case or controversy requirement, to join EPA in a coverage dispute before EPA has brought an enforcement action against the insured, our discussion seeps into vastly different legal ground. The impetus behind this diversion lies in the Supreme Court's opinion in *International Primate Protection League* v. *Administrators of Tulane Educ. Fund,* 111 S. Ct. 1700 (1991). Concerned about the implication of *Primate Protection League* for federal court jurisdiction, we requested supplemental briefing on whether this action was properly removed to federal court. Both sides responded that removal was valid under 28 U.S.C. § 1442(a)(1) because of Belaga's status as a federal officer. Notwithstanding this accord, we must pursue the matter. Litigants cannot confer subject matter jurisdiction by agreement. *See Insurance Corp. of Ir.* v. *Compagnie des Bauxites,* 456 U.S. 694, 702 (1982); *California* v. *LaRue,* 409 U.S. 109, 113 n.3 (1972). Because a federal court is under an unflagging duty to ensure that it has jurisdiction over the subject matter of the cases it proposes to adjudicate, we are obliged to address the propriety of removal as a threshold matter even though neither party has raised a question in that regard. *See Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan,* 111 U.S. 379, 382 (1884) (stating that a federal appellate court, on its own motion,

must "deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmative appear in the record").

A

The officer removal statute, 28 U.S.C. § 1442(a)(1), quoted *supra* note 2, is designed to allow federal officers to remove actions to federal court that would otherwise be unremovable. *See Willingham* v. *Morgan,* 395 U.S. 402, 406-07 (1969) (stating that the section covers all cases in which federal officers, sued in state court, "can raise a colorable defense arising out of their duty to enforce federal law").[3] In *Primate Protection League,* the Supreme Court held that the reference to "any agency" of the United States contained in the officer removal statute did not stand alone, but constituted part of a possessive phrase modifying the noun "officer." *See* 111 S. Ct. at 1705. Put another way, the statute is to be read as if a second "of" appeared in the text immediately following the disjunctive "or." Hence, section 1442(a)(1) permits removal by an "officer of . . . any agency [of the United States]," and, conversely, does not permit removal by the federal agency itself. *See id.* at 1709.

Although *Primate Protection League* makes it crystal clear that EPA, as a federal agency, cannot remove an action to federal court under color of section 1442(a)(1), this case presents a variation on the theme: it requires that we decide the closely related, but nonetheless different, question of whether, for purposes of the officer removal

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[3] This is not to say that *every* case in which a federal officer is a defendant is removable. Rather, removal is limited to situations in which the officer's removal petition demonstrates the existence of a federal defense. *See Mesa* v. *California,* 489 U.S. 121, 136 (1989).

statute, a suit brought against an executive of an agency, *exclusively in the executive's official capacity,* constitutes a suit against an "officer," thereby permitting removal under the statute, or a suit against an "agency," thereby precluding such removal. It is to this inquiry that we now turn.[4]

B

Generally, a suit against an officer in the officer's official capacity constitutes a suit against the governmental entity which the officer heads. For example, in *Kentucky* v. *Graham,* 473 U.S. 159 (1985), the Court dwelt on the distinction between suits against a person in an individual, as opposed to official, capacity. The Court explained that while individual-capacity actions "seek to impose *personal* liability upon a government official," *id.* at 165 (emphasis supplied), payable out of personal assets, *see id.* at 166, an official-capacity action is, "in all respects other than name, to be treated as a suit against the entity." *Id.* Phrased differently, "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell* v. *New York City Dep't of Social Servs.,* 436 U.S. 658, 690 n.55 (1978). Thus, a string of Supreme Court cases holds that a suit against a government officer in his or her official capacity binds the agency or other governmental entity, not the officer personally. *See, e.g., Graham,* 473 U.S. at 166; *Brandon* v. *Holt,* 469 U.S. 464, 471 (1985); *cf. Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 687 (1949) (explaining that, in deciding whether a suit against a government officer is an official-capacity or

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[4] The officer removal statute was first enacted in its present form in 1948. Its legislative history is of no significant assistance in respect to the inquiry at hand.

individual-capacity suit, "the crucial question is whether the relief sought . . . is relief against the sovereign").

The character of an official-capacity suit is not transformed simply because jurisdiction is in issue. In *Loeffler* v. *Frank*, 486 U.S. 549 (1988), a case in which the plaintiff sued the Postmaster General in his official capacity, the Court held that acts of a government officer in his official capacity "are always chargeable" as acts of the agency for purposes of a sue-and-be-sued clause. *Id.* at 563 n.8; *see also FHA* v. *Burr*, 309 U.S. 242, 249-50 (1940) (holding that a suit against the head of an agency in his official capacity was indistinguishable from a suit against the agency itself for purposes of a sue-and-be-sued clause and that a waiver of immunity as to the agency head necessarily waived the agency's immunity). Similarly, even when pondering jurisdictional and quasi-jurisdictional issues, this court has consistently accepted and applied the principle that an official-capacity suit against a government officer is fully equivalent to a suit against the agency. *See, e.g., Northeast Fed. Credit Union* v. *Neves*, 837 F.2d 531, 533 (1st Cir. 1988) ("Where . . . claims are made against a government official acting purely in a representative role, the suit must be regarded as one against the sovereign."); *Culebras Enters. Corp.* v. *Rivera Rios*, 813 F.2d 506, 516 (1st Cir. 1987) (observing that, for Eleventh Amendment purposes, an official-capacity suit is "tantamount to a suit against the [governmental entity]").

We see no reason to forsake the general rule—that a suit against a government officer in his or her official capacity is a suit against the agency—when considering the appropriateness of removal under 28 U.S.C. § 1442(a)(1). The theme of *Primate Protection League*, logically extended, serves an esemplastic purpose, shaping the officer removal statute into a rational whole. In that case, the Supreme Court explained that when a suit for

monetary damages is brought against an officer in his or her individual capacity, the complicated questions that arise as to that officer's immunity support a protective grant of removal jurisdiction. *See Primate Protection League,* 111 S. Ct. at 1708. By contrast, agencies do not need the prophylaxis of federal removal because determining an agency's immunity, unlike determining an individual's immunity, is a "sufficiently straightforward" proposition. *Id.* That rationale strongly favors treatment of official-capacity suits for purposes of removal in the same manner as suits against the agency. After all, because a suit against an officer in her official capacity cannot bind the officer personally, *see, e.g., Brandon,* 469 U.S. at 471, no issues of immunity can possibly arise that differ from those arising in a suit directly against the agency.

Consistency is the touchstone of statutory interpretation. If we were to hold that a suit nominally against EPA is not removable, as *Primate Protection League* demands, but then go on to hold that a suit nominally against EPA's regional administrator in her official capacity—a suit that seeks a judgment binding on the EPA—is nonetheless removable, we would spawn a glaring interpretive inconsistency and, in the bargain, impugn the *Primate* Court's reasoning. Given the identity of juridical interest that exists between a government agency and its executive officer when the latter is sued only in his or her official capacity, the fact that the agency may not remove an action under the officer removal statute compels the conclusion that an official-capacity defendant is likewise disabled from initiating removal thereunder.[5] *See generally*

[5] Ordinarily, the question of whether a complaint names an officer in a personal, as opposed to an official, capacity requires little more than a glance at the pleadings. If, however, a federal official, reasonably believing himself or herself to be sued individually, attempts

Primate Protection League, 111 S. Ct. at 1708 (explaining that access to removal under section 144_(a)(1) does not turn on a "mere technicality").

C

Our conclusion is fortified by Judge Posner's opinion in *Western Secs. Co.* v. *Derwinski,* 937 F.2d 1276 (7th Cir. 1991). There, the Seventh Circuit, acting *sua sponte,* refused to allow a federal administrator sued in his official capacity to remove an action to federal court under section 1442(a)(1). Acknowledging that, in the aftermath of *Primate Protection League,* suits against federal agencies cannot be removed under section 1442(a)(1), *see id.* at 1278, Judge Posner wrote that "while the suit in this case is nominally against the Administrator, it is against him in his official capacity and such suits are considered to be against the government itself." *Id.* at 1279. Thus, the court concluded that, absent an alternative basis for jurisdic-

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to remove under section 1442(a)(1), any dispute as to the officer's status will necessarily be resolved by a federal court in the context of assaying its own jurisdiction. *See* 14A Charles A. Wright, et al., *Federal Practice and Procedure* § 3730, at 499-500 (explaining that a defendant wishing to remove need only file a notice of removal, with the result that the propriety of removal, if challenged at all, will "be tested later in the federal court by a motion to remand"). Thus, our holding that an officer sued in an official capacity may not remove the action in order to obtain a federal forum for resolution of the underlying merits will in no way deprive the officer of access to a federal forum for determination of whether the suit is in fact an action against him or her personally. By the same token, if an officer is sued in both individual and official capacities, we see no bar to removal under section 1442(a)(1). *See El Gran Video Club Corp.* v. *E.T.D., Inc.,* 757 F. Supp. 151, 155 & n.3 (D.P.R. 1991) (observing that federal courts have removal jurisdiction over all pendent claims that are not "separate and independent").

tion, dismissal for want of subject matter jurisdiction would be required. *See id.*[6]

We agree with the Seventh Circuit that *Primate Protection League,* logically extended, mandates that a federal officer sued solely in his or her official capacity may not remove a suit to federal court under the aegis of 28 U.S.C. § 1442(a)(1). In the case before us, this holding draws the sap from the tree: American's suit, brought against Belaga in her official capacity and seeking no relief against her personally, is in reality a suit against the agency. It necessarily follows that, because EPA itself could not have removed this action under section 1442, *see Primate Protection League,* 111 S. Ct. at 1708, Belaga's attempt to remove under the same statutory provision must fail.

III

Notwithstanding that this action was infelicitously removed under 28 U.S.C. § 1442(a)(1) and that the parties steadfastly disclaim any independent basis for federal jurisdiction,[7] we inquire whether any other toehold for federal court jurisdiction exists. Belaga's notice of removal did mention 28 U.S.C. § 1441—a statute which permits removal of any suit that originally could have been

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[6] In *Derwinski* the court retained jurisdiction because the plaintiff's action arose under federal law. *See Derwinski,* 937 F.2d at 1280; *see also* 28 U.S.C. §§ 1331, 1441 (1988).

[7] The parties' appellate filings ground removal jurisdiction solely in the officer removal statute. In answer to our express inquiry anent jurisdiction, Belaga replied that the United States, on her behalf, removed the action pursuant to 28 U.S.C. § 1442(a)(1) and contended that such removal was proper. American averred that, apart from the officer removal statute, it was "not aware of any other basis for federal jurisdiction." Nyacol, by electing not to participate in this appeal, has effectively consented to the appropriateness of a state forum.

brought in federal court.[8] *See, e.g., Merrell Dow Pharmaceuticals Inc.* v. *Thompson,* 478 U.S. 804, 808 (1986). Thus, principles of equity, as well as the law, compel us to explore whether American's declaratory judgment action falls within the federal district court's original jurisdiction. We proceed to run that gauntlet.

A

In this instance, the presence of original jurisdiction hings upon the existence *vel non* of a federal question,[9] that is, the existence of an action "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988). Ordinarily, a claim arises under federal law within the meaning of section 1331 if a federal cause of action appears on the face of a well-pleaded complaint. *See Gully* v. *First Nat'l Bank in Meridian,* 299 U.S. 109, 113 (1936); *Louisville & Nashville R.R.* v. *Mottley,* 211 U.S. 149, 152 (1908). For purposes of determining the existence of federal question jurisdiction in a declaratory judgment action, however, the Supreme Court directs our attention away from the face of the complaint and focuses it instead on the law that creates the underlying cause of action:

---

[8] The statute provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (1988).

[9] The parties to the lawsuit are not of totally diverse citizenship and, apart from the possibility of a federal question, there is no other arguable foundation for federal jurisdiction.

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction. . . .

Public Service Comm'n v. *Wycoff Co.*, 344 U.S. 237, 248 (1952); *see also Franchise Tax Bd.* v. *Construction Laborers Vacation Trust,* 463 U.S. 1, 15-16 & n.14 (1983).

Here, American's declaratory judgment action represents a mounted offensive on two related fronts: the suit is not only an attempt to preempt impending actions by the insureds (seeking, presumably, to secure a defense against charges of environmental harm and to secure indemnification with respect to loss, costs, damages, and expense associated therewith), but it is also an attempt to foreclose governmental authorities from trying to reach insurance proceeds to satisfy as-yet-unrealized judgments under CERCLA. Thus, the underlying causes of action, howsoever visualized, are in the nature of claims to enforce an insurance contract, the adjudication of which will require interpretation of various policy provisions and contract terms. A suit is customarily deemed to arise under the law that gives birth to the cause of action. *See American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Applying that approach, this case is based solely upon, and, therefore, arises under, state law.[10] *See*

---

[10] We note in passing that, were American to assert that CERCLA preempts state insurance actions, such an assertion, while mentioning federal law, would be insufficient to confer jurisdiction because federal law would come into play only as a defense. *See Franchise Tax Bd.*, 463 U.S. at 13-14; *Nashoba Communications, Inc.* v. *Town of Danvers,* 893 F.2d 435, 440 (1st Cir. 1990); *see also Hudson Ins. Co.* v. *American Elec. Corp.*, 957 F.2d 826, 830 n.4 (11th Cir.), *cert. denied,* 113 S. Ct. 411 (1992). We except, of course, the rare case, dis-

CPC Int'l, Inc. v. *Northbrook Excess & Surplus Ins. Co.*, 962 F.2d 77, 97-98 (1st Cir. 1992) (divining applicable state law to interpret a pollution exclusion clause in an insurance policy); *A. Johnson & Co.* v. *Aetna Cas. & Sur. Co.*, 933 F.2d 66, 70-74 (1st Cir. 1991) (same); *Ryan* v. *Royal Ins. Co.*, 916 F.2d 731, 734-35 (1st Cir. 1990) (similar); *In re Acushnet River & New Bedford Harbor*, 725 F. Supp. 1264, 1278-81 (D. Mass. 1989) (certifying various questions regarding the substantive interpretation of an insurance policy to the Massachusetts Supreme Judicial Court in order to determine an insurer's duty to cover cleanup costs), *aff'd in part and rev'd in part on other grounds sub nom. Lumbermens Mut. Cas. Co.* v. *Belleville Indus., Inc.*, 938 F.2d 1423 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992); *see also Hudson Ins. Co.* v. *American Elec. Corp.*, 957 F.2d 826, 828 (11th Cir.) (holding that an insured's potential suit to recover insurance proceeds for its liability under CERCLA arises under "the applicable state law governing the interpretation of insurance contracts"), *cert. denied*, 113 S. Ct. 411 (1992). Federal jurisdiction cannot take root in this arid soil.[11]

---

cussed *infra* p. 15-16, where federal law so completely displaces state causes of action in a particular area that all such claims are "necessarily federal in character." *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63-64 (1987).

[11] We note that CERCLA itself does not provide a direct cause of action against a responsible party's liability insurer. *See Port Allen Marine Serv., Inc.* v. *Chotin*, 765 F. Supp. 887, 889 (M.D. La. 1991) (dismissing claims brought directly against carrier because CERCLA "does not create a direct right of action against [PRP's] insurers"); *cf.* 42 U.S.C. § 9608(c) (allowing direct action against guarantors in limited circumstances). It is, therefore, abundantly clear that American's declaratory judgment complaint anticipates future coercive actions that not only will be entirely governed by state law, but also will be initiated only through state-created mechanisms.

B

In an abundance of caution, we take one additional step. There may exist unusual circumstances wherein a state-created cause of action can be deemed to arise under federal law. For example, when a plaintiff's state-created right to relief "necessarily depends on resolution of a substantial question of federal law," *Franchise Tax Bd.*, 463 U.S. at 28, or when a parallel "federal cause of action completely pre-empts a state cause of action," *id.* at 24, the suit is considered a creature of federal law. We test these waters. The latter proposition (complete preemption) can be summarily dismissed. Structurally, CERCLA provides "no parallel federal cause of action *for the recovery of insurance proceeds for CERCLA-created liability.*" *Hudson,* 957 F.2d at 830. Rather, its provisions, read objectively, choreograph a *pas de deux* wherein CERCLA-driven suits to collect insurance proceeds are to be brought under state law. *See, e.g.*, 42 U.S.C. § 9607(e)(1) (preserving "any agreement to insure, hold harmless, or indemnify a party" for CERCLA liability). We turn, then, to the former proposition (necessary dependence on a federal-law question).

Conceivably, American might argue that a suit to compel it to defend and/or indemnify its insureds is one that, though created by state law, necessarily turns on federal common law. However, such an argument amounts to a call for the application of a uniform federal rule of decision to govern interpretation of an insurance policy's scope of coverage vis-a-vis CERCLA liability. We decline to heed that call in the face of solid precedent pointing in the opposite direction. The massed authority for treating insurance coverage questions in CERCLA cases as peculiarly matters of state law pervades the courts of appeals. *See, e.g., Northbrook,* 962 F.2d at 79; *Northern*

Ins. Co. v. *Aardvark Assocs., Inc.*, 942 F.2d 189, 192 (3d Cir. 1991); *Liberty Mut. Ins. Co.* v. *Triangle Indus., Inc.*, 957 F.2d 1153, 1157 (4th Cir.), *cert. denied*, 113 S. Ct. 78 (1992); *FL Aerospace* v. *Aetna Cas. & Sur. Co.*, 897 F.2d 214, 219 (6th Cir.), *cert. denied*, 111 S. Ct. 284 (1990); *Aetna Cas. & Sur. Co.* v. *General Dynamics Corp.*, 968 F.2d 707, 710 (8th Cir. 1992); *Industrial Indemnity Ins. Co.* v. *Crown Auto Dealerships, Inc.*, 935 F.2d 240, 241 (11th Cir. 1991). State courts chime in tune. *See, e.g., Hazen Paper*, 555 N.E.2d at 579[;] *Boeing Co.* v. *Aetna Cas. & Sur. Co.*, 784 P.2d 507, 509 (Wash. 1990); *Technicon Elecs. Corp.* v. *American Home Assurance Co.*, 542 N.E.2d 1048, 1050-51 (N.Y. 1989).

Case law aside, we doubt that Congress intended CERCLA to be the springboard for catapulting federal courts into what has historically been a state-law preserve. Congress has made it plain that federal legislation should rarely be interpreted to encroach on a state's regulation of insurance. *See, e.g.*, McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988). Nothing in CERCLA suggests that Congress intended to deviate from this regimen. Indeed, CERCLA's text not only envisions the bringing of suits under state law but specifically mandates their resolution in accordance with that law. *See* 42 U.S.C. § 9672(a) (stating that CERCLA's insurance subchapter "shall [not] be construed to affect . . . the law governing the interpretation of insurance contracts of any State"). Thus, CERCLA effectively rebuts the claim that its drafters intended to transform state-law insurance actions into actions arising under federal law.

We think that the situation at hand is closely analogous to that which confronted us in *Royal* v. *Leading Edge Prods., Inc.*, 833 F.2d 1 (1st Cir. 1987). There, a plaintiff sought to recover for breach of a royalty agreement related to a copyrighted work. In an effort to maintain

federal jurisidiction, he argued that his case arose under the federal copyright laws. *See id.* at 2. We disagreed, pointing out that when an action is brought to enforce a royalty contract the action arises out of the contract and not under the copyright statute, even though the contract concerns a copyright. *See id.* at 4. By the same token, an action brought to enforce the pollution-coverage provisions of an insurance policy arises out of the policy and not under federal environmental law, even though any potential recovery under the policy will satisfy a CERCLA-generated liability. *Accord Hudson,* 957 F.2d at 829-30. In this case, as in *Royal,* it would be wrong to arrogate unto the federal courts "jurisdiction over what is essentially a garden-variety contract dispute." *Royal,* 833 F.2d at 5.

In fine, because the insurance dispute which American's declaratory judgment action anticipates is a creature of state law and cannot be said to arise under federal law, original federal question jurisdiction—and, by extension, removal jurisdiction under 28 U.S.C. § 1441(a)—does not lie.

IV

Since neither section 1442 nor section 1441 support[s] the removal of American's declaratory judgment action, there is simply no serviceable hook on which federal jurisdiction can be hung. We, therefore, go no further. Inasmuch as the lower court lacked subject matter jurisdiction, its order dismissing the action against EPA is null. *See Insurance Corp. of Ir.,* 456 U.S. at 701 ("The validity of an order of a federal court depends upon that court's having jurisdiction over . . . the subject matter. . . ."). We vacate the dismissal order and direct that the district court reinstate Belaga, in her official capacity, as a party and

thereafter return the improvidently removed action to the court from whence it emanated.[12]

Vacated and remanded with directions. No costs.

[12] We take no view of Belaga's claims of sovereign immunity, nonjusticiability, unripeness and the like. We are similarly noncommittal as to the effect, if any, of remand on the stipulation entered into between American and DEP. Because the federal courts lack jurisdiction, all such matters must be presented to, and resolved by, the state courts.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1949

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
PLAINTIFF, APPELLANT,

v.

NYACOL PRODUCTS, INC., ET AL., DEFENDANTS, APPELLEES.

ERRATA SHEET

The opinion of the Court issued on February 24, 1993, is corrected as follows:

On page 16, line 25—insert semicolon after "579"

On page 18, line 15—change "support" to "supports"

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 92-10118-Y

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
PLAINTIFF,

v.

NYACOL PRODUCTS, INC., ET AL., DEFENDANTS,

NYACOL PRODUCTS, INC., THIRD-PARTY PLAINTIFF,

v.

COMMERCIAL UNION INSURANCE COMPANY,
ET AL., THIRD-PARTY DEFENDANTS.

ORDER FOR JUDGMENT

This action came on for hearing on May 12, 1992, on the motion to dismiss of Defendant Julie Belaga – named as Defendant in her official capacity as Regional Administrator of the United States Environmental Protection Agency – all claims as against her pursuant to Rule 12, Fed. R. Civ. P. This Court granted said motion from the bench on May 12, 1992, and subsequently ruled that there is no just reason for delay of entry of final judgment on this Court's May 12, 1992, ruling. Accordingly, this Court directs entry of final judgment pursuant to Rule 54(b),

Fed. R. Civ. P., on its May 12, 1992, dismissal of all claims as against Defendant Belaga.

/s/ William G. Young
WILLIAM G. YOUNG, District Judge

June 11, 1992
DATE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 92-10118-Y

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
PLAINTIFF,

v.

NYACOL PRODUCTS, INC., ET AL., DEFENDANTS,

NYACOL PRODUCTS, INC., THIRD-PARTY PLAINTIFF,

v.

COMMERCIAL UNION INSURANCE COMPANY,
ET AL., THIRD-PARTY DEFENDANTS.

[Filed June 5, 1992]

RULE 54(b) CERTIFICATE

With respect to the issue determined by motion, and a hearing on May 12, 1992, on the sufficiency of the pleadings concerning defendant Julie Belaga, in her official capacity as Regional Administrator of the United States Environmental Protection Agency, Region I (hereafter "United States") and to which this certificate is in reference to, it is CERTIFIED, in accordance with Rule 54(b), Fed. R. Civ. P.:

(1) That the Court has directed the entry of final judgment dismissing defendant United States on all Counts in which named; and

(2) That the Court has determined that there is no just reason for delay as the allowance of the United States' motion to dismiss has little to do with the substance of the case.

/s/ William G. Young
WILLIAM G. YOUNG,
District Judge

June 11, 1992
DATE

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 92-10118-Y

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
PLAINTIFF,

v.

NYACOL PRODUCTS, INC., ET AL., DEFENDANTS,

NYACOL PRODUCTS, INC , THIRD-PARTY PLAINTIFF,

v.

COMMERCIAL UNION INSURANCE COMPANY,
ET AL., THIRD-PARTY DEFENDANTS.

JUDGMENT

This action came on for hearing before the Court, the Honorable William G. Young, District Judge, presiding, on the motion of Defendant Julie Belaga, in her official capacity as Regional Administrator of the United States Environmental Protection Agency, Region I, to dismiss all claims as against her, and a decision having been duly rendered from the bench on May 12, 1992, and the Court having further expressly directed entry of final judgment:

It is Ordered and Adjudged that all claims against Defendant Belaga in the above captioned action are dismissed.

Dated at Boston, Massachusetts, this 12 day of June, 1992.

ROBERT J. SMITH, JR.
CLERK OF COURT

/s/ Elizabeth Smith
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1949

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
PLAINTIFF, APPELLANT,

v.

NYACOL PRODUCTS, INC., ET AL., DEFENDANTS, APPELLEES.

Before
SELYA, *Circuit Judge,* COFFIN, *Senior Circuit Judge,*
and STAHL, *Circuit Judge.*

Entered: April 28, 1993

ORDER OF THE COURT

The petition for rehearing with suggestion for rehearing en banc filed by appellee Belaga is, under this court's internal operating procedures, considered both by the panel and by the full court. Panel rehearing is hereby *denied* for the following reasons.

First, a party may not raise new and additional matters for the first time in a petition for rehearing. *See Kale* v. *Combined Ins. Co.,* 924 F.2d 1161, 1169 (1st Cir.), *cert. denied,* 112 S. Ct. 69 (1991); *Anderson* v. *Beatrice Foods*

Co., 900 F.2d 388, 397 (1st Cir.), 111 S. Ct. 233 (1990). That rule has particular pertinence here because, following oral argument, the panel invited supplemental briefing on the specific question of federal court removal jurisdiction in light of *International Primate Protection League* v. *Administrators of Tulane Educ. Fund,* 111 S. Ct. 1700 (1991). Appellee's response at the time was a perfunctory one; none of the arguments raised in her rehearing petition were alluded to in her supplemental brief, even in passing. We will not revisit specific issues merely because an adverse result has infused new vigor into a discontented party's advocacy.

Second, even if we were to consider them, appellee's substantive arguments in no way undermine the force of the panel opinion. Only one such argument merits additional comment. The cynosure of Belaga's petition is her newly emergent contention that the panel's treatment of *Primate Protection League* is insupportable because, she maintains, suits against officers in their official capacities are not equivalent to suits against the agency. Relying primarily on *Kozera* v. *Spirito,* 723 F.2d 1003 (1st Cir. 1983), a pre-*Primate Protection League* case discussing what is loosely termed an "exception[ ] to the doctrine of sovereign immunity . . . in injunctive suits against federal officials," *id.* at 1008 (applying *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-90 (1949)), Belaga disputes the statement that "no issues of immunity can possibly arise [in official-capacity suits] that differ from those arising in a suit directly against the agency." *Ante* at __ [Panel Op. at 9]. Belaga's reliance on *Larson* and its progeny, such as *Kozera,* is misplaced.

Whatever consequences the *Larson* exception may portend in a proper case, it has no applicability here. *Larson* comes into play when either (1) a federal officer acts in excess of his or her statutory authority, or (2) the statute

conferring power upon the officer is unconstitutional, *see Kozera,* 723 F.2d at 1008; *see also Larson,* 337 U.S. at 689-90. The basis for the exception is clear; where the *Larson* criteria are met, "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Larson,* 337 U.S. at 690; where the criteria are not met, however, an official-capacity "suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction." *Id.* at 688. Clearly, then, the *Larson* exception concerns the doctrine of governmental, not official, immunity. Where relief would not be obtainable against the agency, as such, because of sovereign immunity, the exception nevertheless enables a plaintiff to obtain specific relief when an officer is named *and* the case's underlying merits satisfy one of the two conditions described above. *See id.* at 689-90. Viewed in this manner—as a way around the sovereign immunity of agencies—*Larson* erects no shield for protecting individual officers from the impact of lawsuits and, indeed, enunciates no rule bearing thereon.

This is all distant from the jurisdictional issue on which the instant case turns. The functional purpose of the officer removal statute, as expressed in *Primate Protection League,* is to guarantee the availability of a federal forum for the resolution of complicated questions of immunity, *see* 111 S. Ct. at 1708, not to guarantee such a forum for litigation of the underlying merits of every suit against a government actor. When a case, like this one, poses no special questions of immunity as the federal officer/defendant was sued purely in her representative capacity, the defendant must be content with the plaintiff's choice of a state judicial forum to resolve a state-law claim. Belaga points to nothing that can affect her, personally, in any

way that would differ from how the agency would be affected, and, as we have made clear, *ante* at __, __ [Panel Op. at 4, 9], the complaint in this case seeks relief against the sovereign, not against Belaga personally.

We add one final observation. To a large extent, Belaga's belated reference to *Larson* stirs a tempest in a teapot. Whenever a complaint raises a federal question, which will almost always be the case when *Larson* applies, removal is allowed under 28 U.S.C. § 1331. Our decision that official-capacity suits are not removable as such under 28 U.S.C. § 1442(a)(1) will only affect those cases in which an officer is sued in his or her official capacity by a plaintiff whose complaint raises only issues of state law. This case is prototypical of that genre.

The petition for panel rehearing is *denied*.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1949

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
PLAINTIFF, APPELLANT,

v.

NYACOL PRODUCTS, INC., ET AL., DEFENDANTS, APPELLEES.

Before
BREYER, *Chief Judge,* TORRUELLA, SELYA, CYR, BOUDIN
and STAHL, *Circuit Judges,*

Entered: April 28, 1993

ORDER OF THE COURT

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

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Supreme Court
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OFFICE OF THE CLERK

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No. 93-320

In the
Supreme Court of the United States

OCTOBER TERM, 1993

PAUL G. KEOUGH, ACTING REGIONAL ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, REGION 1,
Petitioner,

v.

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
Respondent.

MEMORANDUM OF RESPONDENT, AMERICAN POLICYHOLDERS INSURANCE COMPANY, SUGGESTING A QUESTION OF MOOTNESS.

BRIAN M. HURLEY,
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(617) 542-2300
Attorney for Respondent

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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No. 93-320

In the
Supreme Court of the United States

OCTOBER TERM, 1993

PAUL G. KEOUGH, ACTING REGIONAL ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, REGION 1,
Petitioner,

v.

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
Respondent.

MEMORANDUM OF RESPONDENT, AMERICAN POLICYHOLDERS INSURANCE COMPANY, SUGGESTING A QUESTION OF MOOTNESS.

Respondent American Policyholders Insurance Company ("API")[1] respectfully suggests that a question of mootness has

[1] API is wholly owned by American Patriot Group, Inc., a Massachusetts general business corporation, which in turn is wholly owned by American Mutual Liability Insurance Company, an insolvent Massachusetts insurance company presently in receivership.

arisen with respect to the issue presented by the petition for a writ of certiorari. Specifically, API wishes to draw the Court's attention to the fact that on October 1, 1993, API filed in the Massachusetts Superior Court Department, Middlesex County, where this case is pending after remand from the United States District Court for the District of Massachusetts, a Notice of Voluntary Dismissal with respect to petitioner Paul G. Keough, Acting Regional Administrator of the Environmental Protection Agency, Region 1 ("Mr. Keough"). A copy of the Notice of Voluntary Dismissal, as filed, is attached as Exhibit A. Pursuant to the applicable rule of Massachusetts procedure, no action is required by the state court as a condition precedent to dismissal.

API believes that its dismissal of Mr. Keough as a party in the pending state court litigation renders moot the issues presented by Mr. Keough's petition for certiorari. In light of this development, API requests that this Court deny Mr. Keough's petition so that API may, without delay, continue prosecuting its case against the remaining defendants in state court.

Respectfully submitted,

BRIAN M. HURLEY
RACKEMANN, SAWYER &
BREWSTER, P.C.
One Financial Center
Boston, Massachusetts 02111.
(617) 542-2300
Attorney for Respondent

October 21, 1993

EXHIBIT A.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 91-08667

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
Plaintiff,

v.

NYACOL PRODUCTS, INC., ET AL.,
Defendants.

NYACOL PRODUCTS, INC.,
Third-Party Plaintiff,

v.

COMMERCIAL UNION INSURANCE COMPANY, ET AL.,
Third-Party Defendants.

NOTICE OF VOLUNTARY DISMISSAL

American Policyholders Insurance Company ("API") hereby dismisses Paul G. Keough, Acting Regional Administrator of the Environmental Protection Agency, Region I ("Regional Administrator") as a party to this case pursuant to Rule 41(a) of the Massachusetts Rules of Civil Procedure. API, through counsel, states that the Regional Administrator has not served

an answer or a motion for summary judgment. Accordingly, API is entitled, as a matter of law, to dismiss the Regional Administrator without prejudice.

AMERICAN POLICYHOLDERS
INSURANCE COMPANY

By its attorneys,

/s/ Brian M. Hurley
BRIAN M. HURLEY,
BBO #245240,
DONALD R. PINTO,
BBO #548421,
RACKEMANN, SAWYER
& BREWSTER,
One Financial Center,
Boston, Massachusetts 02111.
(617) 542-2300

October 1, 1993

CERTIFICATE OF SERVICE

I, Brian M. Hurley, certify that I mailed a copy of the foregoing to all counsel of record on this the 1st day of October, 1993.

/s/ Brian M. Hurley
Brian M. Hurley

No. 93-320

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

PAUL G. KEOUGH, ACTING REGIONAL ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, REGION I, PETITIONER

v.

AMERICAN POLICYHOLDERS INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN RESPONSE TO RESPONDENT'S MEMORANDUM SUGGESTING MOOTNESS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-320

PAUL G. KEOUGH, ACTING REGIONAL ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, REGION I, PETITIONER

v.

AMERICAN POLICYHOLDERS INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN RESPONSE TO RESPONDENT'S MEMORANDUM SUGGESTING MOOTNESS

The Solicitor General, on behalf of the Acting Regional Administrator of the United States Environmental Protection Agency, Region I, files this reply to the Memorandum of Respondent, American Policyholders Insurance Company, Suggesting a Question of Mootness.

1. On December 20, 1991, respondent, American Policyholders Insurance Company (API), filed suit in the Superior Court for Middlesex County, Massachusetts, against three of its policyholders, Daniel S. Greenbaum, in his capacity as the Commissioner of

the Massachusetts Department of Environmental Protection (DEP), and Julie Belaga, in her capacity as the Regional Administrator of EPA Region I (Regional Administrator). The complaint sought a declaratory judgment relieving API from defending or indemnifying the policyholders for any claims that EPA or DEP might make against them under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*, or under state law for hazardous waste contamination at a site in Ashland, Massachusetts. The complaint stated that the Regional Administrator and the Commissioner of DEP were "named as parties solely to fulfill the requirements of Massachusetts common law that the underlying claimants be bound by any declaration entered between an insurer and its insured." C.A. App. 10; Pet. 3.

2. In January 1992, the Regional Administrator removed the action to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. 1441 and 1442.[1] Pet. 3-4. In May 1992, the

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[1] 28 U.S.C. 1441(a) provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. 1442(a)(1) provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United

district court dismissed API's claims against the Regional Administrator pursuant to Fed. R. Civ. P. 12(b)(6). API appealed the order of dismissal to the United States Court of Appeals for the First Circuit. In the meantime, the district court remanded the remaining claims to state court. Pet. 4-5.

3. Relying principally upon *International Primate Protection League* v. *Administrators of Tulane Education Fund*, 111 S. Ct. 1700 (1991), the First Circuit held that the Regional Administrator lacked the authority to remove this action pursuant to the federal officer removal statute, 28 U.S.C. 1442(a)(1), because she had been sued exclusively in her official capacity, rather than in her individual capacity. Pet. App. 10a. It further held that removal was not proper under 28 U.S.C. 1441. Pet. App. 10a-11a. It accordingly vacated the district court's order of dismissal and directed the district court on remand to reinstate the Regional Administrator as a defendant and to remand API's claim against her to the state court. Pet. App. 16a-17a. The First Circuit subsequently denied the Regional Administrator's petition for rehearing and suggestion of rehearing en banc. *Id.* at 25a-28a, 29a.

4. On August 26, 1993, the Solicitor General, on behalf of the Acting Regional Administrator, filed a petition for a writ of certiorari presenting the following question (Pet. I):

States for the district and division embracing the place wherein it is pending:

> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *.

May an officer of the United States remove a civil action under Section 1442(a)(1) when he or she is sued exclusively in his or her *official* capacity, or does Section 1442(a)(1) apply only when an officer is sued in his or her *individual* capacity?

5. On October 1, 1993, API filed a Notice of Voluntary Dismissal in state court dismissing the Acting Regional Administrator from this case pursuant to Rule 41(a) of the Massachusetts Rules of Civil Procedure.[2]

6. On October 21, 1993, API filed a memorandum suggesting mootness in this Court.

ARGUMENT

Respondent suggests that this case is moot in light of its voluntary dismissal of the Acting Regional Administrator from the case. We infer from respondent's voluntary dismissal and its suggestion of mootness that it does not intend to renew its claim

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[2] Mass. R. Civ. P. 41(a)(1) provides in pertinent part:

> Subject to the provisions of these rules and of any statute of this Commonwealth, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs * * *. Unless otherwise stated in the notice of dismissal * * *, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any other state an action based on or including the same claim.

At the time that API filed its Notice of Voluntary Dismissal, the Acting Regional Administrator had not filed an answer or a motion for summary judgment.

against the Acting Regional Administrator (or any of his successors in office) at a future stage of this litigation or in any future action. If that understanding is correct, we agree that this case is moot. We disagree, however, with respondent's contention that the petition should be denied. Rather, in accordance with its established practice, the Court should grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals for entry of an order directing the district court to dismiss respondent's claim against the Acting Regional Administrator with prejudice.

1. In *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), this Court stated that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." See also *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 n.* (1979) (per curiam) (*Munsingwear* is "perhaps the leading case on the proper disposition of cases that become moot on appeal"). In accordance with that "established practice," the Court has repeatedly emphasized that "[w]hen a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint." *Deakins* v. *Monaghan*, 484 U.S. 193, 200 (1988); see *Honig* v. *Doe*, 484 U.S. 305, 329 (1988) (Rehnquist, C.J., concurring) (*Munsingwear* "has been followed fairly consistently over the last 30 years").

There is no reason for the Court to depart from its settled practice in the present case. The Court has followed *Munsingwear* when, as here, a case has become moot as a result of unilateral conduct by the party who prevailed in the court below. *Deakins*, 484 U.S. at 199-200; see also *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 512-513 (1989); *Frank* v. *Minnesota Newspaper Ass'n*, 490 U.S. 225, 227 (1989) (per curiam); *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 329 (1961). The Court has also followed *Munsingwear* when, as here, a case has become moot while a petition for a writ of certiorari is pending. See, *e.g.*, *Sale* v. *Haitian Centers Council, Inc.*, 113 S. Ct. 3028 (1993); *Sivley* v. *Soler*, 113 S. Ct. 454 (1992); *Yellow Freight Sys., Inc.* v. *United States*, 113 S. Ct. 31 (1992); *Clarke* v. *Ross*, 111 S. Ct. 2882 (1991).

We have argued in previous cases that, in the latter situation—*i.e.*, when a case becomes moot while a certiorari petition is pending—certiorari should be denied if the case is not one that would have warranted review on the merits. See 77-900 U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978); see also 92-1123 U.S. Br. as Amicus Curiae Supporting Respondents at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.* (argued Oct. 12, 1993). In this case, however, further review on the merits would be warranted for the reasons set forth in our petition (at 7-22).

2. If this Court agrees with us that a *Munsingwear* order is appropriate, the Court should specify in the order that on remand, the court of appeals should direct the district court to enter an order dismissing

respondent's claim against the Acting Regional Administrator with prejudice. A dismissal with prejudice is necessary to prevent respondent from renewing its claim against the Acting Regional Administrator (or any of his successors in office) in this or a future action.

This Court followed that course under similar circumstances in *Deakins*. The petitioners there were New Jersey law enforcement officers who seized documents from the respondents' business office under a search warrant issued in a state grand jury investigation. *Deakins*, 484 U.S. at 195-196. The respondents sued the petitioners in federal court under 42 U.S.C. 1983, seeking damages and an injunction requiring petitioners to return the documents. *Id.* at 196-197. After this Court granted certiorari to determine whether the district court was required to abstain from adjudicating the respondents' claims for equitable relief under *Younger* v. *Harris*, 401 U.S. 37 (1971), the respondents filed a memorandum suggesting mootness, and they told the Court that they did not wish to pursue those claims in federal court and would amend their federal-court complaint to omit the claims. *Deakins*, 484 U.S. at 197-199. The petitioners argued that the respondents' promise to amend their complaint to withdraw their claims for equitable relief did not render the case moot, because "nothing will prevent respondents * * * from nullifying that amendment by further amendment or from filing a new complaint" renewing their claims, and that the district court would refuse to abstain from adjudicating those claims in light of the court of appeals' prior holding that abstention was not appropriate. *Id.* at 199-200. The petitioners contended that

"this potential for manipulation render[ed] the case 'capable of repetition, yet evading review,' and should therefore shield it from a conclusion of mootness." *Id.* at 200.

This Court rejected the petitioners' argument, finding that it "misconceived" the effect that respondent's withdrawal of their claims "will have on the shape of the federal litigation." *Deakins*, 484 U.S. at 200. The Court explained (*ibid.*):

> When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). This disposition strips the decision below of its binding effect. And respondents can be prevented from reviving their claims by the order of dismissal. Because this case was rendered moot in part by respondents' willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated. This will prevent the regeneration of the controversy.

The Court accordingly held that "respondents' claims for equitable relief are moot," and it "vacate[d] the portion of the Court of Appeals' judgment addressing those claims and remand[ed] with instructions to dismiss the claims for equitable relief with prejudice." *Id.* at 204.

The present case, like *Deakins*, presents a "potential for manipulation" that can be avoided by a *Munsingwear* order specifying a dismissal with prejudice. In the absence of such an order, respondent

could, having dismissed its claim against the Acting Regional Administrator without prejudice, renew that claim by amending its complaint in this case at a later stage of the proceedings or by filing a new complaint. If the Acting Regional Administrator then removed the action to federal district court, the district court would be bound by the judgment of the court of appeals to remand the action to state court. That scenario would render the question presented here "capable of repetition, yet evading review," and therefore not moot, but for "[t]he Court's ability to prevent respondent[] from renewing [its] claim[]" by entering a *Munsingwear* order providing that respondent's claim against the Acting Regional Administrator "is dismissed with prejudice." *Deakins*, 484 U.S. at 200-201 n.4.[3]

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[3] In contrast to the respondents in *Deakins*, 484 U.S. at 199, respondent API has not expressly represented to this Court that it will not renew its claim against the Acting Regional Administrator at a later stage of this proceeding or in a future proceeding. As explained earlier, pp. 4-5, *supra*, however, we believe that such a representation is implicit in respondent's voluntary dismissal of its claim against the Acting Regional Administrator and its suggestion that this case is moot. If our understanding is correct, then respondent can have no basis for objecting to a dismissal with prejudice. If, on the other hand, respondent has not ruled out the possibility of renewing its claim against the Acting Regional Administrator, then this case would not be moot. In that event, there would be a reasonable likelihood that the conduct on which our petition is based—*i.e.*, respondent's maintenance of a claim against the Regional Administrator based on the possibility that EPA might take action against respondent or its policyholders in connection with the Ashland site—would recur. Cf., *e.g.*, *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) ("[m]ere voluntary cessation of allegedly illegal conduct does

CONCLUSION

For the reasons set forth above and in our petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for entry of an order directing the district court to dismiss respondent's claim against the Acting Regional Administrator with prejudice.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1993

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not moot a case"); accord *Northeastern Florida Chapter of the Associated General Contractors of America* v. *Jacksonville*, 113 S. Ct. 2297, 2301 (1993); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Accordingly, if respondent is unwilling to be precluded from renewing its claim against the Acting Regional Administrator (or any of his successors in office), then the Court should reject respondent's suggestion of mootness and grant the petition.

(4)

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No. 93-320

In the Supreme Court of the United States

OCTOBER TERM, 1993

PAUL G. KEOUGH, ACTING REGIONAL ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, REGION 1,
Petitioner,

v.

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
Respondent.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT, AMERICAN POLICYHOLDERS INSURANCE COMPANY.

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SUPPLEMENTAL MEMORANDUM OF RESPONDENT, AMERICAN POLICYHOLDERS INSURANCE COMPANY.

Respondent American Policyholders Insurance Company ("API") submits this supplemental memorandum to respond to two issues raised for the first time in a reply brief recently filed by petitioner Paul G. Keough, Acting Regional Admini-

strator of the Environmental Protection Agency, Region 1 ("Mr. Keough").

On October 21, 1993, API submitted a memorandum suggesting that the issues presented by the instant petition for certiorari have been mooted by API's voluntary dismissal of its claims against Mr. Keough. This dismissal was effected in state court, where this case is presently pending after remand from the federal district court. API's memorandum further suggested that, in light of the dismissal, Mr. Keough's petition should be denied so that the state court proceedings may continue without further delay.

In response to API's suggestion of mootness, Mr. Keough filed a reply brief in which he (1) "infers" from API's voluntary dismissal of its claims that API does not intend to renew its claims against Mr. Keough or his successors at any time in the future, and (2) contends that this Court should grant the petition for certiorari, vacate the judgment of the court of appeals and direct that the district court dismiss API's claims with prejudice.

With respect to Mr. Keough's inference concerning API's future intentions, API initially made Mr. Keough's predecessor a party to this case based on an apparent requirement of Massachusetts law that "underlying claimants" such as Mr. Keough must be present in order for a state court to make a binding declaration with respect to insurance coverage. However, in light of Mr. Keough's strenuous efforts to extricate himself from the case, and the substantial delay and expense to API that resulted from those efforts, API decided to voluntarily dismiss Mr. Keough from the case and to attempt to persuade the state courts that, at least where the underlying claimant is a government official or government entity that resists participating in the declaratory judgment action on sovereign immunity grounds, the rule requiring the presence of the under-

lying claimant should be relaxed. In the event API's mission fails, and the state courts rule that, even in the circumstances of the instant case, the underlying claimant must be present, API may decide to renew its claims against Mr. Keough. API has preserved its right to do so by voluntarily dismissing its claim against Mr. Keough *without* prejudice through an appropriate state court procedure.

With respect to Mr. Keough's contention that the Court should grant the petition for certiorari in order to effect a dismissal of API's claims *with* prejudice, API submits that its claims against Mr. Keough have *already* been dismissed. The fundamental distinction between the situation here and the situations in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), *Deakins* v. *Monaghan*, 484 U.S. 193 (1988), as well as in the other cases Mr. Keough cites in part I of his reply argument, is that in each of those cases, the parties were still properly before the Court at the time the issue of mootness was raised, albeit arguably with no justiciable case or controversy remaining between them. Here, in contrast, by virtue of API's dismissal of its claims against him, Mr. Keough simply is no longer a party to this case. Accordingly, there is no jurisdictional predicate upon which this Court may base

any further action in this matter beyond the denial of Mr. Keough's petition for certiorari.[1]

Respectfully submitted,

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December 13, 1993

[1] That Mr. Keough recognizes this fact is evidenced by his recent motion to stay the state court proceedings, including the state court's consideration of Mr. Keough's own motion to dismiss. Mr. Keough argued that such a stay was necessary because, in the absence of a "live" controversy between himself and API, the Supreme Court *could not consider* his petition for certiorari. The state court denied Mr. Keough's stay motion, after which API availed itself of the appropriate state court procedure to voluntarily dismiss its claims against Mr. Keough. Thus, just as surely as if Mr. Keough's motion to dismiss had been allowed, API's voluntary dismissal of its claims has eliminated any "live" case or controversy between itself and Mr. Keough.